

STATE OF SOUTH CAROLINA

(Caption of Case)

IN RE:

Happy Rabbit, LP on Behalf of,

Windridge Townhomes, Complainant,

v.

Alpine Utilities, Inc., Respondent

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET

NUMBER: 2008 - 360 - S

(Please type or print)

Submitted by: Richard L. Whitt

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DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition ☐ Request for item to be placed on Commission's Agenda expeditiously

Other: Routine

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)		
<input type="checkbox"/> Electric	<input type="checkbox"/> Affidavit of Publication	<input type="checkbox"/> Letter	<input type="checkbox"/> Request
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certifica
<input type="checkbox"/> Electric/Telecommunications	<input type="checkbox"/> Answer	<input type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigat
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter
<input type="checkbox"/> Gas	<input type="checkbox"/> Certification of Mailing	<input type="checkbox"/> Petition for Rulemaking	<input type="checkbox"/> Response
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discove
<input checked="" type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition
<input type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input checked="" type="checkbox"/> Return	<input type="checkbox"/> Subpoena
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/> Other:
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest	
<input type="checkbox"/> Other:	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit	
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report	

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2008-360-S

IN RE:)
Happy Rabbit, LP on Behalf of,)
Windridge Townhomes,)
)
Complainant,)
v.)
)
Alpine Utilities, Inc.,)
Respondent.)
_____)

**COMPLAINANT'S
RETURN TO MOTION FOR
SUMMARY JUDGMENT**

TO: Respondent Alpine Utilities, Inc., (hereinafter, "Respondent Alpine" or "Respondent") and its attorney of record, Benjamin P. Mustian.

INTRODUCTION

Summary Judgment, in South Carolina, is only appropriate where no genuine issue as to material fact is involved and further inquiry into the facts is not desirable to clarify the application of the law. Tupper v. Dorchester County, 487 S.E.2d 187 (1997). There are genuine issues of material facts involved in this case and further inquiry into the facts is desirable to clarify the application of the Law, and Summary Judgment is not appropriate in this matter.

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences there from must be viewed in the light most favorable to the party opposing Summary Judgment. Summer v. Carpenter, 492 S.E.2d 55 (1997); Hamiter v. Retirement Div. of South Carolina Budget & Control Bd., 484 S.E.2d 586(1997). When the evidence and the reasonable inferences to be drawn there from are viewed in the light most favorable to Complainant, summary judgment is not appropriate as a matter of law.

The case *sub judice* does not lend itself to Summary Judgment for the Respondent. A review of Alpine's Motion for Summary Judgment reveals that the Motion does not even address the facts and the applications of law to this dispute. The Motion seems to, instead, rehash portions of the dispute without reaching a cogent conclusion.

REVIEW OF ALPINE'S MOTION FOR SUMMARY JUDGMENT

I. Alpine's Interpretation of § 27-33-50 Would, "Stand the Law on its Head"

Alpine's interpretation of § 27-33-50 requires that the reader not give English words their normal meaning. Furthermore, Alpine's interpretation is backwards, Alpine's interpretation ignores and forgives Alpine's violation of the statute, begins with the unlawful result and declares to the world, "See, Alpine did not violate the law, because of the resulting position of its violation of the law, is not a violation of the law." Alpine's position is inapposite and startling.

Alpine has acknowledged that a representative of Happy Rabbit contacted Alpine on October 6, 2003 and informed Alpine of § 27-33-50. Happy Rabbit's representative maintains that during that conversation, Happy Rabbit asked that service be terminated by Alpine and service be established with the individual tenants at Windridge as required by § 27-33-50. Alpine refused to comply with § 27-33-50 and the proof is that Alpine to the date of this writing has not complied with § 27-33-50, despite Mr. Cook's request.

Each time Alpine discusses § 27-33-50, it begins with, "Alpine is serving Happy Rabbit and the tenants of Windridge are not our customers." This self-serving statement continually ignores the fact that Alpine refused to serve the tenants of Windridge and required, and continues to require, Happy Rabbit to be its customer in violation of § 27-33-50.

Section 1 of Alpine's Motion for Summary Judgment does not lend any compelling support for their Motion for Summary Judgment.

II. Alpine Continues to Set Forth Reasons Why it Cannot Comply With § 27-33-50, When it Knows or Should Know, Compliance With a State Law is Not Contingent on Alpine's Particular Difficulties

Alpine's discussion in its Motion for Summary Judgment on this Motion is irrelevant.

Section 2 of Alpine's Motion for Summary Judgment does not lend any compelling support for their Motion for Summary Judgment.

III. The Fact that Happy Rabbit is Presently a Customer of Alpine is of no Import in this Docket

As Happy Rabbit has been forced to state *ad nauseam*, the fact that Happy Rabbit is presently a customer of Alpine is meaningless in the context of Happy Rabbit's Complaint. Happy Rabbit was "forced" to become and remain, a customer of Alpine and as Happy Rabbit has maintained since October 6, 2003, Alpine's requirement that Happy Rabbit be Alpine's customer for Windridge's tenants is a clear cut violation of § 27-33-50.

Section 3 of Alpine's Motion for Summary Judgment does not lend any compelling support for their Motion for Summary Judgment.

IV. Alpine Maintains that there is Some Legal Significance to the Fact that Happy Rabbit Entered into a Contract for Service.

Once again, Happy Rabbit repeats that it was forced into entering a contract with Alpine in order to allow its tenants at Windridge to receive sewer service. Alpine has admitted that Happy Rabbit informed Alpine on October 6, 2003 about the existence of § 27-33-50.

In this section, Alpine improperly argues that Happy Rabbit is a successor in interest to Mrs. Cook. Happy Rabbit is not a successor in interest to Mrs. Cook and there is no jural connection. Alpine's counsel **confuses**, "successor in ownership to a property", with, "successor in interest". Also in this section, Alpine refers to Commission Regulation R. 103-534 as somehow controlling in this dispute. It is axiomatic that a statute controls over a regulation and Alpine's argument is without support.

Section 4 of Alpine's Motion for Summary Judgment does not lend any compelling support for their Motion for Summary Judgment.

V. Alpine Alleges that There is Some Legal Significance to the Date Happy Rabbit Filed its Formal Complaint Against Alpine.

Alpine's argument, that Happy Rabbit somehow was responsible for engaging the services of an attorney, filing a formal Complaint, and expending time and thousands of

dollars to stop Alpine's continuous violations of the law § 27-33-50, since October 6, 2003, is astonishing!

Alpine was and is, charged with compliance with the law, § 27-33-50, which was enacted and effective on July 1, 2002 and their lack of compliance cannot be transferred to others.

Alpine does not provide any case law or statutory support for its argument no. (5) of its Motion for Summary Judgment, because there is no legal support for their argument. Alpine does make one reference to a case, "An injured party must act promptly when the facts and circumstances of the injury would place a reasonable person on notice that a claim against another party might exist." Republic Contracting Corp. v. S.C Dep't of Highways and Public Transp., 332 S.C. 197, 503 S.E.2d 761, 766 (Ct. App. 1998). The case cited by Alpine's counsel concerns the running of a statute of limitations. The single case cited by Alpine's counsel has nothing to do with the continuous violation of a state statute, and a third party's requirement to prevent the same.

Section 5 of Alpine's Motion for Summary Judgment does not lend any compelling support for their Motion for Summary Judgment.

VI. Alpine Asserts that Enforcement of § 27-33-50 Would Result in a Windfall for Happy Rabbit

Alpine can hardly be heard to complain that Alpine's refusal to comply with § 27-33-50, in recognition of this Commission's Regulation, R. 105-533 (3), since July 1, 2002, would lead to a result of which Alpine disapproves.

Section 6 of Alpine's Motion for Summary Judgment does not lend any compelling support for their Motion for Summary Judgment.

VII. Alpine has Abandoned its Previous Argument that a Contract Between Alpine and the Developer of Windridge was Somehow Assigned to Happy Rabbit or Binding on Happy Rabbit

1. Happy Rabbit filed an Affidavit with this Commission on March 19, 2009 from George W. DuRant which factually contradicts Alpine's repeated argument that a

contract between Alpine and the developer of Windridge was somehow assigned to Happy Rabbit or binding on Happy Rabbit, therefore § 27-33-50 did not apply.

2. The filing of that Affidavit alone, enclosed hereto as Exhibit "A" is a material fact in dispute and is sufficient to defeat Alpine's Motion for Summary Judgment.

3. The filing of that Affidavit has apparently caused Alpine to abandon that argument as it is not contained in their Motion for Summary Judgment, although it was argued repeatedly in this case, including in the Direct and Surrebuttal Testimony of Robin Dial.

VIII. Alpine's Argument that § 27-33-50 Cannot be Considered by This Commission in a Willful Overcharge Complaint is Erroneous

4. It is uncontroverted that the Commission has exclusive jurisdiction to decide complaints from customers of a public utility, as to a willful overcharge. In order to adjudicate a complaint, the Commission may, and indeed must, take into consideration the General Laws of the State of South Carolina. In the context of this Complaint, the Commission must read the law, *in pari materia*.

5. Therefore, this Commission must hear the willful overcharge Complaint under R. 105-533 (3) *in pari materia* with § 27-33-50 S.C. Code Ann. (1976, as Amended). The fact that § 27-33-50 does not appear under Title 58 of the S.C. Code is not of any import, as to the Commission's authority to hear and decide willful overcharge Complaints under one of its Regulations. Whenever this Commission finds, after hearing, that the rates charged and collected by a public utility are in anywise in violation of any provision of law, this Commission shall determine the just and reasonable rates to be charged by a public utility § 58-5-290. The State hereby asserts its rights to regulate the rates and services of every public utility § 58-5-210.

6. There is overwhelming statutory¹ (see *infra* note 1) and case law authority² (see cases cited *infra* note 2) for this Commission to decide a willful overcharge Complaint, in light of § 27-33-50. The following cases were relied upon by counsel for Alpine Utilities, Inc., (hereinafter, “Alpine) in their, “Motion for Summary Judgment”, filed with this Commission on March 31, 2009. Both cases cited by Alpine’s counsel contain similar language that the Commission **(i) not only has its express statutory authority from the General Assembly but, the Commission has power and jurisdiction, “...impliedly [conferred] by the General Assembly,”** (emphasis added) (see cases cited *infra* note 2) **and (ii) this Commission has powers conferred upon it, “...by reasonably necessary implication by the General Assembly.”** (emphasis added) (see cases cited *infra* note 2) Both cases cited by counsel for Alpine acknowledge that this Commission not only has express authority conveyed upon it by the General Assembly of the State of South Carolina, but also has power and jurisdiction impliedly conferred by the General Assembly and powers conferred on it by reasonably necessary implication by the General Assembly. By Alpine’s counsel’s acknowledgment, this Commission has implied power and jurisdiction and reasonably necessary powers to hear willful overcharge Complaints established under one of its own Regulations, using a specific statute, not contained in Title 58 of the S.C. Code. In addition, this Commission has express authority to hear a willful overcharge Complaint under R. 105-533 (3), using § 27-33-50, as set forth herein and the statutes set forth on Exhibit “A” hereto.

7. The statutory authority for the Commission to hear this case follows: Alpine by definition is a public utility regulated by this Commission § 58-5-10. This Commission has power and jurisdiction to supervise and regulate the rates and service of every public utility in this State...to be furnished, imposed, or observed, and followed by every public utility in this State § 58-3-140. The Public Service Commission is hereby,

¹ Commission statutes which are applicable are § 58-3-140, § 58-5-10 (4), § 58-5-210, § 58-5-290, and § 58-5-300. (See, Exhibit “A” hereto with each statute set forth.)

² See Kiawah Property Owners Group v. Public Serv. Comm’n of S.C., 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) (“The PSC is a government agency of limited power and jurisdiction, which is **conferred either expressly or impliedly by the General Assembly.**”) (emphasis added); City of Camden v. Public Service Comm’n of S.C., 283 S.C. 380, 382, 323 S.E.2d 519, 521 (1984) (“The Public Service Commission is a governmental body of limited power and jurisdiction, and has only such powers as are **conferred upon it either expressly or by reasonably necessary implication by the General Assembly.**”) (emphasis added)

to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State,...and **the State hereby asserts its rights to regulate the rates and services of every “public utility” as herein defined** (emphasis supplied) § 58-5-210. Whenever the Commission shall find, after hearing, that the rates...charges...however or whensoever they shall have theretofore been fixed or established, demanded,...charged or collected by any public utility for any service,...that the rules,...affecting such rates...charges...are...**or in anywise in violation of any provision of law**, the Commission shall,...determine the just and reasonable... charges...or practices to be thereafter observed and enforced and [this Commission] shall fix them by order as herein provided (emphasis supplied) § 58-5-290. In connection with a determination under § 58-5-290 the Commission may consider all facts which in its judgment have a bearing upon a proper determination of the question, although not set forth in the application and not within the allegations contained therein § 58-5-300.

8. The authority cited above militates against the idea that this Commission cannot hear a willful overcharge Complaint, because a statute outside Title 58 has been violated by a public utility subject to the jurisdiction of this Commission. It is suggested that this Commission defer this Complaint to the Circuit Court, although that Court would not be able to decide and award the damages contemplated by the South Carolina General Assembly when it approved the Commissions Regulation, R. 105-533 (3).

CONCLUSION

The case *sub judice* does not lend itself to Summary Judgment for the Respondent. A review of Alpine's Motion for Summary Judgment reveals that the Motion does not even address all the facts in dispute and the applications of law to this dispute. The Motion seems to, instead, rehash portions of the dispute without reaching a cogent conclusion. Accordingly, based on the foregoing, the Pleadings of this case and the Affidavit filed in this case and attached hereto, Alpine's Motion for Summary Judgment must be denied.

Respectfully submitted,

_____/s/_____
Richard L. Whitt
Jefferson D. Griffith, III

Counsel of Record for Carolyn L. Cook
and Happy Rabbit, a South Carolina
Limited Partnership on behalf of Windridge
Townhomes

Columbia, South Carolina

RLW/jjy
Enclosure

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

**AFFIDAVIT OF
GEORGE W. DuRANT**

Personally appeared before me, GEORGE W. DuRANT, who being duly sworn, deposes and says that he is over the age of twenty-one (21) years and makes this Affidavit based on the best of his personal knowledge, and states as follows:

1. My name is George W. DuRant and in 1999 I was a principal and authorized signatory of Windridge Limited Partnership (the "Partnership").

2. In 1999 I executed documents on behalf of the Partnership to sell real property located at 3300 Kay Street, Columbia, Richland County, SC, known as "Windridge Townhomes" (the "Property") to Carolyn Cook ("Cook").

3. I have no recollection of and, to the best of my knowledge, there was no contract between the Partnership and Alpine Utilities, Inc. ("Alpine") and I am not aware of the existence at the time of the sale of a contract that would bind Cook to Alpine.

4. To the best of my knowledge and recollection, I did not assign any contracts at the time of sale or otherwise pertaining to Alpine or that would bind Cook to Alpine.

5. To the best of my knowledge and recollection, no contracts with Alpine were provided to Cook nor did I place Cook on notice of any contracts with Alpine.

6. To the best of my knowledge, Cook is only a successor in title to the Partnership and the Property, Cook is not, "a successor or assign," of the partnership, and has no *jural* relationship to the Partnership.


SWORN TO BEFORE ME THIS

11 day of March, 2009

 (SEAL)

Notary Public

My commission expires: 10-29-2017

 (SEAL)
GEORGE W. DuRant, on behalf of
Windridge Limited Partnership

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2008-360-S

IN RE:

Happy Rabbit, LP on Behalf of,
Windridge Townhomes,

Complainant,

v.

Alpine Utilities, Inc.,

Respondent

CERTIFICATE OF SERVICE

I, Jessica Yun, an employee of Austin & Rogers, P.A., certify that I mailed a copy of Happy Rabbit's Return to Alpine's Motion for Summary Judgment in the above referenced matter as indicated below, via U.S. Mails as addressed below, with proper postage affixed thereto, or e-mail on April 3, 2009.

Attorney Benjamin P. Mustian
P.O. Box 8416
Columbia S.C., 29202-8416
Via U.S. Mail and Via e-mail

Nanette S. Edwards, Esquire
Via e-mail

Austin & Rogers, P.A.

/S/
Jessica Yun

Columbia, South Carolina
April 3, 2009